IN THE SUPREME COURT
STATE OF MICHIGAN

Appeal from the Court of Appeals
Whitbeck, P.J., Smolenski and Cooper, J.J.
Court of Appeals #2222447

PAUL DRESSEL AND
THERESA DRESSEL, **Docket #119959**

Plaintiffs-Appellees,

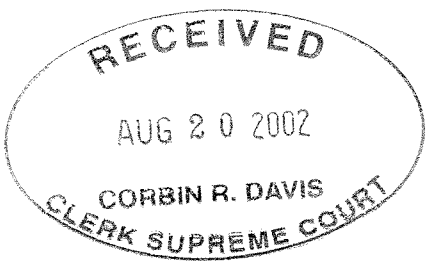
v

AMERIBANK,

Defendant-Appellant

AMICUS BRIEF OF THE STATE BAR OF MICHIGAN

Janet K. Welch (P42091)
General Counsel
State Bar of Michigan
306 Townsend Street
Lansing, MI 48933
(517) 346-6300



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STATEMENT OF JURISDICTION

Jurisdiction in this Court is properly vested pursuant to MCR 7.301 (A)(2) and MCR 7.302. The State Bar of Michigan was invited to participate as *amicus curiae,* without requirement of motion, by letter dated April 23, 2002 from Supreme Court Clerk, Corbin R. Davis.

STATEMENT OF QUESTIONS INVOLVED

To the extent that legal knowledge and discretion is required, do the current exceptions to the prohibition on the unauthorized practice of law permit lending institutions to charge borrowers a fee for the promissory notes and mortgages the borrowers sign?

Appellant Answers: Yes

Appellees Answer: No

Amicus State Bar of Michigan Answers: No

Is this state preempted from enforcing activity it determines to be unauthorized practice of law against lenders regulated by the federal government? (emphasis added)

Appellant Answers: Yes

Appellees Answer: No

Amicus State Bar of Michigan Answers: No

STATEMENT OF INTEREST

The State Bar of Michigan is a public body corporate established pursuant to 1935 PA 58, and regulated pursuant to Const 1963, art 6, §5 and PA 58 by the Michigan Supreme Court. State Bar Rule 16 gives the State Bar responsibility for investigating and prosecuting the unauthorized practice of law. Given its responsibility for the prosecution of the unauthorized practice of law (UPL) and its limited resources for the discharge of that responsibility, it is in the interest of the State Bar of Michigan that the law concerning unauthorized practice be stated as clearly and definitively as possible.

In addition to its responsibilities for prosecuting the unauthorized practice of law, the State Bar of Michigan is also charged by this Court with responsibility for "improving relations between the legal profession and the public," and "promoting the interests of the legal profession in this state."[1] State Bar Rule 1. The common interest of the profession, the public, and the state is that unqualified people not provide services to the general public in circumstances that put the public's significant legal rights and interests at risk. Lawyers are trained to determine, advise upon, protect, and, where necessary, assert and defend the legal rights and interests of their clients. Because of the fundamental importance of legal work to the fair and orderly functioning of society and the high degree of training required to perform it properly, the state requires that the practitioners of this work be licensed and has given the Supreme Court and the State Bar of Michigan

[1] Some of the amici for AmeriBank have commented pejoratively both about Michigan's statute addressing UPL by corporations and on the motives of the legal profession in general seeking enforcement of the prohibition against the unauthorized practice of law. The law is established

responsibility for enforcement, within a regulatory system that includes a well-developed standard of care and mechanisms for accountability.

The laws addressing the unauthorized practice of law encompass the circumstances under which the state has determined that the public's legal rights and interests may be put at risk and that thus justify regulation. The profession has no interest in extending what one amicus has described as its "professional monopoly" beyond those circumstances, but when those circumstances exist, the State Bar of Michigan has been delegated the responsibility to defend the lawyer's role.

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by the State, not by lawyers. Lawyers have no interest in extending the scope of the definition of the practice of law into ministerial activities.

SUMMARY OF ARGUMENT

Michigan does not extend its regulation of the practice of law to activities involving legal documents that are simply ministerial and do not involve discretion, because such activities do not threaten public harm. The statutes and case law addressing the unauthorized practice of law encompass only those circumstances in which the public's legal rights and interests are put at risk from untrained individuals and from those who are not subject to the ethical standards, obligations, and sanctions to which licensed lawyers are subject. For corporations, Michigan has established specific statutory exceptions to the prohibition on the unauthorized practice of law that have been narrowly construed by this Court.

There is a factual dispute in this case as to whether the preparation of the documents in question involved, or should have involved, the application of discretion involving legal issues. If it does not, the State Bar agrees with AmeriBank that the document preparation is not the practice of law, authorized or unauthorized.

Some aspects of AmeriBank's document preparation, however, appear necessarily to implicate legal discretion. If legal discretion was (or should have been) applied to the preparation of a document, borrowers whose documents are prepared by laypersons are vulnerable to the risk of inappropriate choices, and their vulnerability is increased if they are neither aware that the preparer was a layperson nor that the documents have been prepared solely for the purpose of protecting the lender's interests. In such circumstances, borrowers may not have the opportunity to acquire independent and

informed legal counsel from someone whose professional code of ethics requires that the service be rendered exclusively in the borrower's own interest. The fact that borrowers are charged a separate fee for the document preparation exacerbates this problem, because the fee increases the risk that the borrowers will miscomprehend the nature of the activity to which the fee applies and decreases the funds at their disposal to secure independent legal counsel.

Although the State Bar agrees with the concerns of AmeriBank and its amici about the harm that can result from too rigid or broad an application of the unauthorized practice of law statute, it is equally concerned that some of the lines of reasoning advocated by the Appellant, if adopted, would have the effect of eroding rather than clarifying Michigan's UPL statutes. This would apparently not be an unintended consequence of AmeriBank advocacy, as several of the amicus briefs openly challenge the wisdom of unauthorized practice of law statutes in general.

Like all other states, Michigan has chosen to address the public harm associated with uninformed and unskilled activity concerning legal matters through lawyer licensure and regulation of the unauthorized practice of law. Our licensing and regulatory provisions are neither the most restrictive nor the most permissive in the nation. While there are other possible ways to address the public harm at which our UPL laws are aimed, including alternative certification, limited licensing, tort remedies, and explicit elaboration within consumer protection law, these alternatives have not been developed in Michigan. Unless other protections are evaluated and adopted, the line of reasoning in Michigan's case law interpreting the UPL statutes should be maintained.

With narrow exceptions, the present law prohibits corporations from using nonlawyers for the preparation of documents involving the application of legal discretion, where the documents are to be signed by a party other than the corporation and affect that party's legal rights. It is unclear from the facts the extent to which the challenged practice violates this prohibition,[2] but we urge the Court to proceed cautiously in creating new exceptions to existing law. Given the absence of alternative safeguards, to do otherwise would be inconsistent with the purpose of the unauthorized practice of law statutes.

If the challenged practice involves only simple "fill in the blanks" forms, which for the purposes of sale on the secondary market may not be altered or added to in any way, and which affect and secure only the legal rights of the lender, then the State Bar would agree with AmeriBank and its amici that the practice does not and should not be characterized as the practice of law, regardless of whether or not a fee is charged to borrowers. The State Bar does not dispute that businesses must be allowed to pass on the costs of seeing that their own legal rights are secured. Further, it does not dispute that, like individuals, corporations are free to assume for themselves whatever risk may be involved in relying on laypersons for legal matters affecting only the corporation. Indeed, it believes this is the underlying rationale for the *pro se* exception to the statutory prohibition on the practice of law by corporations. However, if there is discretion or judgment involved in preparation of legal documents offered to another party for that

[2] For example, a number of amici make central to their arguments the assertion that the forms in question "cannot be changed," but it appears that in this case nonuniform provisions were added to the standardized forms.

party's signature and affecting the rights and obligations of that party, then that preparation logically must fall outside the protection of the exception, whether or not a fee is charged, so as not to pass the risk of the lay person's judgment unknowingly on to the other party. [3]

[3] The State Bar acknowledges that it is not always obvious whether the proper preparation of particular documents requires the application of legal knowledge and discretion. The Supreme Court of Indiana has supplied a helpful test: "Generally, it can be said that the filling in of blanks in legal instruments, prepared by attorneys, which require only the use of common knowledge regarding the information to be inserted in said blanks, and general knowledge regarding the legal consequences involved does not constitute the practice of law. However, when the filling in of such blanks involves considerations of significant legal refinement, or the legal consequences of the act are of great significance to the parties involved, such practice may be restricted to members of the legal profession." State ex rel Indiana State Bar Ass'n v Indiana Real Estate Assn, Inc, 244 Ind 214, 220; 191 NE2d 711, 715 (1963).

LAW AND ARGUMENT

THE NATURE OF THE DOCUMENTS SHOULD BE CENTRAL TO THE DETERMINATION OF WHETHER THE PRACTICE IN QUESTION IS THE PRACTICE OF LAW

The documents at issue are residential home loan documents, including an adjustable rate note and the mortgage itself, which are characterized in HUD literature provided to borrowers as "final legal papers." (Appellee's Index, HUD Guide, Line 1105, App. 10b). Every state covers documents of this type within its practice of law regulation, although some, Michigan included, have chosen to permit other certified or licensed individuals such as real estate brokers to prepare some of these documents under very limited circumstances. Ingham County Bar Ass'n v Walter Neller Co, 342 Mich 214; 69 NW 2d 713 (1955).

The states' interest in the integrity, honesty, and competence of consumer transactions is at its greatest in the context of residential real estate. Certainty in property interests is essential to economic stability. Given the extraordinary significance of home ownership to the public welfare, as well as the complexity of the law of real property, it is not surprising that the statutory and case law concerning the unauthorized practice of law is particularly vigorous in this context.[4]

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[4] Some amici suggest that the reasoning of the Court of Appeals in this case could have a deleterious application to other commercial activity. There is no evidence for that proposition, nor any inevitability to the conclusion. Although there are cars more expensive than some homes, the law in all jurisdictions has developed substantially more elaborate protections for the conveyancing of real property, for good reason: the societal significance and complexity of the law of real property. Not only is the purchase of a home the average person's single most important investment, constituting the foundation of a family's assets, but the body of common

The central question in the determination of whether a particular activity is the practice of law is whether the activity should require the application of legal knowledge and discretion. Although the preparation of documents of this nature in general constitutes the practice of law, the simple act of inputting data where there is no room for discretion does not. AmeriBank contends that its activity falls within this safe harbor.

It may well be that much, perhaps even most, of AmeriBank's document preparation activity is ministerial and thus falls outside the practice of law. But it is difficult to imagine how the activity in question is wholly ministerial, involving as it does a process concerning real estate transactions in which hundreds of thousands of dollars are committed, that begins with no documents and ends with "final legal papers," including a note and mortgage. These are precisely the conditions in which Michigan law has been most protective of the need for attorney involvement, but the record does not appear to show anywhere in AmeriBank's document preparation process the involvement of any attorney, or for that matter, of any individual otherwise trained in legal knowledge, alternatively certified, or subject to the standard of care of a lawyer.[5]

Three aspects of the document preparation process are particularly worthy of attention, because they implicate discretionary judgment: document selection, information concerning the status of the property owners, and nonuniform covenants.

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law concerning property rights is vast and exceptionally complicated. A Mercedes Benz may cost more than many homes, but it can't be owned as a tenant by the entirety, nor is its ownership subject to the rule against perpetuities.

[5] Presumably, the standard Fannie Mae and Freddie Mae forms were drafted by an attorney, but that involvement was not specific to the transaction in question and was prior to AmeriBank's involvement.

When there is a range of legal documents with different legal consequences available to accomplish a particular purpose, the act of choosing a document is discretionary. Although this Court has not previously been confronted with a case in which document selection is a central issue, several other jurisdictions have addressed this point explicitly. In Perkins v CTX Mortgage Co, 137 Wash 2d 93, 969 P 2d 93 (1999), a case with many similarities to this one, the Supreme Court of Washington concluded:[6]

> "The practice of law includes the selection and completion of legal instruments by which legal rights and obligations are established. [Citations omitted]. It is established that the selection and preparation of promissory notes and deeds of trust is the practice of law." [Citation omitted]. Perkins, 97.

The Perkins Court held that lenders were permitted to prepare the types of legal documents ordinarily incident to their financing activities only if the lay employees participating in the document preparation did not exercise any legal discretion. The

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[6] The Washington State Court Rules also reference document selection in the definition of the practice of law:

> "(a) General definition: The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law. This includes, but is not limited to:
>
> (1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
> (2) **Selection**, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).
> (3) Representation of another entity or person(s) in a court, or in a formal administrative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
> (4) Negotiation of legal rights or responsibilities on behalf of another entity or person(s)."

GR 24, Washington State Court Rules. (Emphasis added)

Perkins Court imposed this condition regardless of whether a fee was charged for the documents. Perkins, 106. The Court specifically noted that CTX attorneys selected the loan products, created the documents necessary for each loan product, and supervised the programming of the central computer that generated the form templates. The borrower's attorney prepared the other documents requiring the exercise of legal judgment such as the purchase and sale agreement, the earnest money agreement, the HUD-1, the excise tax affidavit, the warranty deed, and the escrow instructions. Perkins, 95.

In contrast, AmeriBank does not claim the involvement of an attorney in any aspect of the document preparation process, and instead argues that the use of an attorney would be an unnecessary additional cost. According to the deposition testimony of Lee Pankratz, Chief Lending Officer for Ameribank, a non-attorney selected the loan documents and the non-uniform covenants that were added to the uniform documents. (Deposition Testimony of Lee Pankratz, pp 66-68, Appellee's Appendix, 34b). There is no such thing as a "one size fits all" mortgage note, nor is there only one type of deed. The act of deciding which document fits a particular transaction involves interpreting relevant real estate laws and making a choice and is, therefore, the practice of law.

Some of the AmeriBank amici sketch out an attractive case for the public benefit of the use of standard Fannie Mae and Freddie Mae forms, warning that a holding against AmeriBank might threaten the economic advantage that flows to the public from the sale of mortgages using these forms on the secondary market. However, the fact that AmeriBank's own business interest compels the use of particular standardized, federally approved forms so that the mortgage can be sold on the secondary market does not negate

the fact that discretionary document selection with legal implications may be involved in the document preparation activity at issue, and if this is the case, Michigan has chosen to regulate this activity as the practice of law, for the protection of the public.[7]

It may be that a careful analysis of the cost benefits and risks to consumers of the use of a standard federally approved form might support exempting the choice-of-document aspect of the loan documents of this type from UPL prosecution, subject to safeguards. Such an analysis ideally would involve testimony from a wide range of interested parties, including consumer groups, a review of empirical data and economic scholarship on the subject, and recommendations to the Court of a balanced, independent panel. The Court does not have the benefit of such an analysis in this case, and the State Bar urges caution about relaxing existing protections in the absence of such an analysis.

In addition to the document selection aspect of the activity in question, at least one aspect of the information AmeriBank adds to the documents implicates legal discretion and consequences: the status of co-owners of property. If two unmarried individuals jointly purchase real property, they must decide whether to take title as "joint tenants" or "tenants in common." Filling in the blanks in such cases requires not only knowledge of the status of the co-borrowers but also knowledge and application of the various types of joint ownership.

Finally, although AmeriBank and its amici place great emphasis on the uniform, standardized nature of the forms they prepare, there is evidence in the record that the

[7] A case can be made that the emergence of standardized forms in the residential lending and refinancing industry makes it more, rather than less, desirable that there be attorney involvement at some point in the transaction process.

mortgage actually used in this case contained non-standard covenants added by a non-attorney.[8] The covenants are not part of the standard mortgage "form" and are legally binding obligations. Their presence in these documents should raise a red flag about characterizing AmeriBank's entire document preparation operation as simply ministerial.

THE *PRO SE* EXCEPTION SHOULD NOT APPLY TO PRACTICES FOR WHICH A BUSINESS CHARGES A FEE

AmeriBank and its amici claim that its nonattorney preparation of legal documents essential to its lending business falls within the *pro se* exception of MCL 450.681,[9] whether or not it charges a fee for the activity. The State Bar of Michigan concurs with the appellee that Michigan's case law does not support this claim. The *pro se* exception for corporations logically cannot, and for public policy reasons should not, apply to activities for which a separate fee is charged.

This Court has twice held practices to be the unauthorized practice of law on the basis that a fee is charged for the practice. Neller and State Bar of Michigan v Kupris, 366 Mich 688; 116 NW 2d 341 (1962). This Court has never held that a practice challenged as the unauthorized practice of law for which a fee is charged falls within the protection of the *pro se* exception. The decision below considered the Neller and Kupris

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[8] Appellant's Appendix 9A, p. 13a; Deposition testimony of Lee Pankratz, pp 66-68, Appellee's Appendix 34b.

[9] Some amici also refer to an "incidental business" exception, which is not found in the language of MCL 450.681 but is a phrase that appears in some UPL cases, as if it were somehow another freestanding exception. In our view, the "incidental business" case law reference and the "lawful business" provision of MCL 450.681 are simply two different phrases to describe the logical application of the *pro se* exception to corporations, i.e., if a corporation is acting on its own behalf without the benefit of an attorney in legal activities, it may only do so incidental to its [lawful] business, not as a secondary business.

decisions to have established a general rule on the charging of a fee to be applied to all cases in which the *pro se* exception is invoked.

AmeriBank would distinguish these cases on the basis that the defendants were real estate brokers and, in AmeriBank's view, not a "party to" the transactions for which they prepared documents. Michigan's test, however, is not whether the actor is a "party to" a transaction but whether the actor is "interested in" the transaction. [10] The fact that AmeriBank's interest in the transaction was as a party rather than as an agent should subject AmeriBank's activity to greater, rather than less, scrutiny and regulation. Not only were those preparing the documents unlicensed, without training, and without a legal duty of care to the person being charged for the documents but in some significant respects the entity to whom they did owe allegiance, AmeriBank, had interests in the document directly antithetical to those of the person being charged.

Nevertheless, the State Bar strongly agrees with AmeriBank that the charging of a fee should not be the touchstone for determining the unauthorized practice of law: the touchstone must be the nature of the practice in question. Certain activity, such as holding oneself out as a provider of legal services when one is not licensed, is the unauthorized practice of law regardless of whether a fee is charged. Legal work creating or analyzing a document offered to a corporation for its consideration or to be offered by the corporation for another party's consideration in a transaction with that party need not be done by a lawyer if the corporation chooses to assume the risk for itself of the lay

[10] Neller and Kupris are not favorable to AmeriBank in another sense, as well. AmeriBank's document preparers, unlike real estate brokers, do not have the extensive training in real estate matters of brokers, and are not professionally licensed by the state.

work. But when others' legal rights are affected, the character of the practice changes, and the *pro se* exception becomes questionable. As the Arizona Supreme Court observed in State Bar of Arizona v Arizona Land Title and Trust Co, 366 P 2d 1 (Ariz 1961), "[o]ne is not practicing law for one's own corporation when third parties are affected by the legal documents drafted." If the work is offered for another's consideration and a fee is charged for it, the character of the act is more questionable still: it is no longer an act incidental to the corporation's business – it becomes in effect its own business activity. This change in character explains why so many jurisdictions have reached the same result as this Court in Neller and Kupris and why the Washington Supreme Court has explicitly adopted a bright line rule that a layperson who receives compensation for legal services may not rely on the *pro se* exception.[11] "The receipt of compensation is conclusive evidence that the layperson is not merely acting for himself but has assumed the additional burden of acting for another." Perkins, 99.

This conclusion does not mean that businesses should not be able to recoup the costs of doing business, whether or not those costs involve legal work. But recouping fees for costs associated with the preparation of legal documents by charging a separate fee for documents that affect the legal rights of, and are signed by, the borrower is problematic, because the charge may encourage the borrower to believe either or both of

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[11] See, for example, Pulse v North Amer Land Title Co, 707 P 2d 1105 (Mont 1985), holding that the charging of a fee is one of three factors to be considered; and Miller v Vance, 463 NE 2d 250 (Ind 1984), holding that the filling in of blanks on a standardized form is not the practice of law if the non-lawyer gave no legal advice or opinion and the bank did not charge separately for the preparation of the documents.

the following: that the legal documents were prepared, supervised, or reviewed by an attorney and that the document preparation is a "service" provided on the borrower's behalf. Neither is true.

The State Bar agrees with amicus curiae Michigan Bankers Association that the question of what the borrower believes about the documents and the fee is an important consideration. A party's reliance on advice or services alone has been held to be a key determinant of whether certain conduct is the purported or actual practice of law, even when there is no compensation for the activity. State Bar of Arizona, 88. However, compensation alone can increase the likelihood of reliance.

The State Bar believes that under the circumstances of the Dressel transactions, in which borrowers are charged significant amounts for documents of substantial legal import prepared for their signature, the potential for borrowers to be misled about the nature of the document preparation fee is considerable.[12] Given the amount charged and the nature of the documents, it is certainly conceivable that borrowers might conclude that a legal service is being rendered on their behalf, or at the very least, that their legal rights and interests have been taken into consideration.[13] Which is more plausible: that the borrower will believe that a $400 charge for the preparation of legal documents covers the cost of someone printing off standard forms and mechanically inserting data,

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[12] Under "arms length" transactions in which the buyer and seller have bargained for provisions that bind them both, the potential for the consumer to be misled is less, but in such arms length transactions fees are not typically charged.

[13] AmeriBank and its amici criticize the Court of Appeals for characterizing the document preparation as a "service" to the borrower, but more than one of their briefs refer to the activity as a "service." Further, the record itself reveals that the preparation of the documents is categorized as a service in literature available to the borrower. Appellee's Appendix, HUD Guide "Prohibited Fees" p 8b; Line 1105, p 10b; "Lender Required Settlement Costs," p 5b.

or that the $400 fee buys the application of some higher level of skill? Having paid a large fee for the document preparation, might not the borrowers believe that some professional level of scrutiny has taken place and that they have some protection against defects in the documents? Concern that a customer may be misled by a separate charge surely is a fundamental consideration in UPL decisions banning a separate fee and is compelled by the underlying purpose of the unauthorized practice of law statutes - the protection of the public.

Several of the AmeriBank amici suggest that if lending institutions cannot charge a separate fee for document preparation, they will continue their current practice and simply fold the cost into the points charged rather than identifying them as a separate charge, or, conversely, they will not be able to make a profit, and they will stop their lending practice in Michigan. The State Bar does not know which, if either, of these predictions is true, but it would note that if AmeriBank's profit rests upon the document preparation fee, that would appear to be evidence that AmeriBank is in the document preparation business rather than the lending business, in which case the activity is not "incidental" to its lawful business. A third alternative not mentioned by AmeriBank is that it could do what many other lending institutions do: employ a lawyer for the nonministerial, true legal aspects of the document preparation, thus satisfying the requirement that only a licensed lawyer perform legal work, and inform the borrower of the fact that the lawyer's work was on the lender's rather than the borrower's behalf.

AmeriBank and its amici also assert that if lawyers are required to be part of the document preparation process, nothing will change but the cost. The State Bar notes that

it is far from clear from the record what AmeriBank's costs and profit are, or what is a reasonable estimate of the comparable costs of attorney involvement.[14] As to the activity in question, AmeriBank is saying in effect that attorneys would prepare the documents in all cases exactly as the lay staff prepares them. There is no evidence presented for this assertion. A careful reexamination of the costs and benefits of attorney involvement in the preparation of documents of this kind may well be called for, but again, such an examination at the very least should involve testimony from a wide range of interested parties, and a broad review of empirical data and academic literature and could be aided by the recommendations of a specially appointed independent panel.

Even if lay preparation of the documents in question were demonstrated to be substantially the same as attorney preparation, the lack of a professional standard of care and enforcement mechanisms deprives borrowers of a layer of protection afforded when attorneys play a role in the preparation. For example, in Michigan, as in most states, it is a conflict of interest for an attorney to draft documents on someone's behalf if the representation of that person is materially limited by the lawyer's responsibilities to another client or to a third party, unless the person is advised of the conflict and consents to the representation despite the conflict. Michigan Rules of Professional Conduct, Rule 1.7. Lawyers may not, when dealing with a person not represented by counsel, state or imply that the lawyer is disinterested. Michigan Rules of Professional Conduct, Rule

[14] To begin the task of a meaningful comparison, one would want to know how long AmeriBank's lay preparers take to complete their activity and how long a lawyer would typically take to complete the same activity. Neither AmeriBank nor its amici have offered this information. It would also be necessary to reach a conclusion about how long it should take to complete the task competently.

4.3. In the instant case, there is no evidence in the record that the Dressels were advised by the mortgage company that the person preparing documents for which they were charged was not a neutral party, much less evidence that they consented.

Appellant and amici suggest that requiring an attorney to draft the mortgage documents in question would result only in an increase in the expense to the borrower. We state, to the contrary, that any attorney retained on behalf of a mortgage company to draft the mortgage documents would be required under MRPC 4.3 and 1.7 to advise the borrowers that the attorney is not disinterested and is representing solely the lender's interest.

If, in fact, no legal knowledge is required for the document preparation in question, and there is no application of discretion concerning legal issues, then AmeriBank's assertion that attorney involvement in this activity would not change the product is likely to be correct. If that is the case, the activity is not the practice of law, no *pro se* exception is needed, and AmeriBank should be permitted to charge a document preparation fee, although a more apt description of the fee on those facts would be "form data entry fee."

MCL 450.681 MUST BE NARROWLY CONSTRUED SO AS NOT TO WHOLLY UNDERMINE THE PROTECTION OF THE STATUTE

AmeriBank asserts that its document preparation activity is exempt from UPL coverage by virtue of this provision of MCL 450.681: "This section shall not apply to any corporation or voluntary association lawfully engaged in a business authorized by the provisions of any existing statute." Although AmeriBank takes care to note that it does

not prepare legal documents but merely "fills in the blanks" of standard forms, the thrust of its "lawful business" argument is that lending institutions should be able to market the nonattorney preparation of any legal documents and services incidental to its lending business. We would urge the Court not to adopt this reasoning, which is contrary to all Michigan case law and the language of the statute itself.

Under AmeriBank's broad interpretation of the lawful business exception, any business authorized by statute could market to the public any practice of law activity associated with the business, provided that it was incidental to, and packaged as part of, another service provided by the business. By charging a separate fee and making a profit on that discrete component, the business could make a business of the legal activity itself. Arguably, ministers and marriage counselors would be able to market pre-nuptial agreement services, insurance agents to market trust instruments. Such a broad interpretation undermines the overall purpose of the statute, in effect permitting the exception to swallow the whole.[15] In the context of the entire act and its concluding sentence, "But no corporation shall be permitted to render any services which cannot lawfully be rendered by a person not admitted to practice law in this state...", it is clear that the provision in question is an elaboration of corporate *pro se* exception by which the Legislature meant to leave undisturbed settled business practices. This Court affirmed

[15] Taking the sentence out of context, one could also argue that the provision, which has no clause restricting its application to activities related to the business authorized, is even broader than claimed by AmeriBank and some of its amici, exempting any corporation whose business is authorized by statute regardless of whether its practice of law activity was related to its business. Under either interpretation, much of the rest of the language of the statute is rendered either meaningless or superfluous.

this interpretation soon after the enactment of the statute: "It is apparent that this provision was embodied in the statute by the legislature so it might be definitely understood that it was not the intent of the legislature by this enactment to restrict the powers conferred upon corporations by other acts of the legislature under which such corporations were organized." Detroit Bar Ass'n v Union Guardian Trust Co, 282 Mich 216, 225; 276 NW 365 (1937). If the exceptions were meant to be read as broadly as AmeriBank suggests, the legislature would not have needed to create a separate exception for the title insurance business: "This section shall not apply to any corporation or voluntary association lawfully engaged in a business authorized by the provisions of any existing statute, *nor to a corporation or voluntary association engaged in the examination and insuring of titles of real property*...". (Emphasis added).

THE FACT THAT THE STATE BAR HAS NOT PROSECUTED A PARTICULAR PRACTICE SHOULD NOT BE ACCEPTED AS EVIDENCE THAT THE STATE BAR HAS CONCLUDED THAT THE PRACTICE IS LEGAL

Some of the AmeriBank amici suggest that the fact the State Bar is not the plaintiff in this case is significant. We urge the Court not to heed this argument. Because the State Bar has limited resources to investigate and prosecute violations of the unauthorized practice of law statutes, the fact that the State Bar has not filed an action to enjoin or prosecute a particular practice should never be considered as evidence that the State Bar has concluded that the practice is legal.

In an attempt to fortify their implication of State Bar acquiescence to the practice in question, AmeriBank and several of its amici also note that the practice in question is

longstanding and widespread. The State Bar does not know how long the practice has been in existence or how widespread it is, but regardless of the truth of the matter, it believes that the duration and incidence of the practice should not be a factor in the Court's determination. There is no such thing as adverse possession of statutory authority; an institution cannot effectively assert a constructive easement across MCL 450.681 or case law.

FEDERAL BANKING REGULATIONS DO NOT PREEMPT MICHIGAN'S AUTHORITY TO REGULATE THE PRACTICE OF LAW WITHIN ITS BORDERS

Amici Huntington National and Rock Financial point out that the federal government has preempted the states' authority to regulate fees charged by federal savings associations. (Emphasis added; Ameribank is a state-chartered institution). The issue in this case, however, is the regulation of the unauthorized practice of law, an area traditionally regulated by states and not the regulation of fees charged by lenders. United States Supreme Court case law holds that there is a presumption against preemption of matters traditionally regulated by the states, absent a clear and manifest intent to preempt the states' historic powers.[16]

[16] States have a substantial interest in regulating the practice of law within their borders. Sperry v State of Florida, 373 US 379, 383; 83 S Ct 1322, 1325; 10 L Ed 2d 428 (1963). There is a presumption against finding preemption in areas traditionally regulated by the states, California v ARC America, 490 US 93; 109 S Ct 1661; 104 L Ed 2d 86 (1989). The Tenth Amendment to the United States Constitution bars federal regulation or legislation that intrudes into areas of traditional state regulation, unless the intent to pre-empt the historic powers of the States is clear and manifest. Gregory v Ashcroft, 501 US 452; 111 S Ct 2395; 115 L Ed 2d 410 (1991), Rice v Santa Fe Elevator Corp 331 US 218, 230; 67 S Ct 1146, 1152; 91 L Ed 1447 (1947).

CONCLUSION

The reasoning applied to the resolution of the substantive issues in this case is critical to Michigan's jurisprudence regarding the unauthorized practice of law, and lower courts' future determinations of whether activities under emerging circumstances constitute the unauthorized practice of law.

There is a factual dispute in this case as to whether the preparation of the documents in question involved, or should have involved, the application of discretion involving legal issues. If it does not, the State Bar agrees with AmeriBank that the document preparation is not the practice of law, authorized or unauthorized. Case law from other jurisdictions, and the little evidence in the record, suggests, however, that legal discretion is necessarily implicated in the document preparation process in question.

The concern of the State Bar is that the creation of a new exception, or an expansion of the *pro se* exception, to the general prohibition against corporations drafting documents for third parties that involve the application of legal discretion, would, in the absence of other consumer safeguards, weaken the public protection underpinning of the unauthorized practice of law prohibition. The existence of other public protection measures was an implicit factor in the Washington Supreme Court's decision in Perkins.[17] Perkins, 106 and footnote 2. Creating a new exception in Michigan, or

[17] The Washington Supreme Court recently promulgated a court rule defining the practice of law and a court rule which purpose is to: " . . . create a Practice of Law Board in order to promote expanded access to affordable and reliable legal and law-related services, expand public confidence in the administration of justice, make recommendations regarding the circumstances under which non-lawyers may be involved in the delivery of certain types of legal and law related services, enforce rules prohibiting individuals and organizations from engaging in unauthorized

expanding an established exception to the unauthorized practice of law statute should not be undertaken without a corresponding adoption of other public protection measures.

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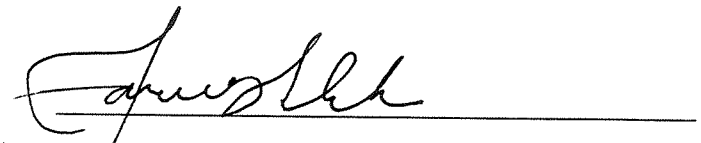
legal and law related services that pose a threat to the general public, and to ensure that those engaged in the delivery of legal services in the State of Washington have the requisite skills and competencies necessary to serve the public. GR 25, Washington State Court Rules.

RELIEF REQUESTED

The State Bar believes that certain facts in dispute (whether the practice in question involves the exercise of legal judgment) should be dispositive but does not believe it is appropriate for the Bar to take a position on the factual dispute in this case. The State Bar's interest lies in the reasoning used to resolve the issues of this case, rather than in the relief granted.

Respectfully submitted:

August 20, 2002



Janet K. Welch (P42091)
State Bar of Michigan
306 Townsend Street
Lansing, MI 48933